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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAR 3 0 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a network services provider for small businesses. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition (Form I-140).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The Director determined that the beneficiary did not have an advanced degree, as defined above, and did not satisfy the minimum educational requirement for the proffered position, as specified on the labor certification. In particular, the Director determined that the beneficiary did not possess a master's degree in networking/computer security, CS (computer science), network management, or a closely related field, nor a foreign equivalent degree in one of those fields.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision.

The first issue on appeal is whether the beneficiary's educational credentials from France are equivalent to a U.S. master's degree, which would qualify him for classification as an advanced degree professional under section 203(b)(2) of the Act. The second issue is whether the beneficiary meets the job requirements of the proffered position as set forth on the ETA Form 9089 (labor certification).

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision except for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (INS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference,

the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *See Matter of Shah, supra.* Where the analysis of the beneficiary's credentials relies on work experience and/or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." [1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree plus the requisite five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

For the classification of advanced degree professional the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

"baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). (Emphasis added.)

The documentation of record shows that the beneficiary was awarded "*Le Diplome d'Ingenieur*" (Diploma of Engineering) from the [redacted] located in Brest and Rennes, Brittany. The diploma was awarded on March 14, 2002, after the beneficiary had completed three years of academic coursework in Brest during the years 1997-1999 and 2000-2001. The beneficiary also gained some experience with a company in San Francisco, California, from July 1999 to July 2000, which was not a part of his academic degree. To qualify for admission to the three-year engineering program at [redacted], the beneficiary had to complete a two-year course of preparatory study ("*classes preparatoires aux Grandes Ecoles*") and then pass a competitive entrance examination ("*le concours*"). The beneficiary apparently took his "*classes preparatoires*" at the [redacted], though there is no documentation in the record of that two-year program.

In his decision denying the petition, dated September 17, 2008, the Director determined that the petitioner had failed to establish that the beneficiary's *Diplome d'Ingenieur*, representing five years of post-secondary study, is equivalent to a U.S. master's degree in engineering.

On appeal counsel asserts that the Director did not adequately review the documentation submitted by the petitioner, including some evaluations of the beneficiary's educational credentials, informational materials about the educational system in France and five-year engineering programs at U.S. universities, and previous decisions issued by the AAO in degree equivalency cases. Counsel also asserts that the Director over-relied on the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that a *Diplome d'Ingenieur* is comparable to a U.S. bachelor's degree in engineering. Counsel claims that this finding is faulty, and conflicts with other information in the EDGE database indicating that a *Diplome d'Ingenieur* is equivalent to a U.S. master's degree.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO will first address the substance of the *Diplome d'Ingenieur* – including the academic program required to earn the degree and its place in France's educational system – as gleaned from the informational materials submitted by the petitioner and the EDGE database. The *Diplome d'Ingenieur* is a degree awarded by [redacted] elite schools that operate parallel to France's universities. In comparison to the country's universities, which are comprehensive educational institutions covering a wide range of fields, the [redacted] are smaller in size and narrower in focus, supplying France with most of its engineers, industrial research specialists, managers and administrators. The [redacted] requires five years of post-secondary study following the *baccalaureat* (equivalent to a U.S. high school education). The first two years of study – focused on mathematics and the physical sciences – are called "*classes preparatoire aux* [redacted] and are completed either at [redacted] or at a lycee (French high school). At the end of the two-year [redacted] students must pass a highly competitive examination (*le concours*) to gain admittance into a [redacted] To earn a *Diplome d'Ingenieur*, three years of engineering studies at a [redacted] are required. The end result is a single degree following five years of post-secondary study.[3]

In the instant case, the beneficiary followed the normal path of two years in [redacted][4] and three years in [redacted] to earn his *Diplome d'Ingenieur*.

As evidence of the U.S. equivalency of this degree, the Director relied primarily upon information in AACRAO's aforementioned Electronic Database for Global Education (EDGE). According to its website, www.accrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.*

According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council

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[3] It is possible to enter some Grandes Ecoles after three or four years of study at a university, and complete one or two years of additional study at the Grande Ecole to earn a *Diplome d'Ingenieur*. This scenario does not apply to the beneficiary in this case.

[4] As previously mentioned, there is no documentation in the record of the beneficiary's two-year CPGE program. However, since completion of such a program (and passage of *le concours*) are prerequisites for admission into a Grande Ecole, it is likely that the beneficiary did complete a two-year CPGE program. The only specific reference thereto is in one of the educational evaluations (from [redacted] which mentions that the beneficiary did his two years of preparatory study at [redacted] in Poitiers.

on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that U.S. Citizenship and Immigration Services (USCIS) had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

With regard to the *Diplome d'Ingenieur*, EDGE describes it as a "3-year, post-secondary, 2nd cycle program in engineering" that is "comparable to a bachelor's degree in engineering in the United States." According to counsel, however, EDGE actually supports the petitioner's assertion that the beneficiary's *Diplome d'Ingenieur* is equivalent to a U.S. master's degree, once the change in France's educational system since 1999 is taken into consideration.

As explained by counsel, the Bologna Declaration for uniform accreditation of higher education in the European Union prompted France to introduce the "*Mastaire*" by decree in August 1999 as a master-level degree to supplement its three existing degrees: *baccalaurat*, *licence*, and *doctorat*. The *Mastaire* required five years of post-secondary study and could be earned in either a university or a [redacted]. By decree in April 2002 France changed the name of this degree to "*Master*" to facilitate its international acceptance.[5] An annotation on the certified English translation of the beneficiary's *Diplome d'Ingenieur* (issued on March 14, 2002) reads as follows:

> The attribution of the title Engineer holding a diploma from the "ENST Bretagne" (Telecommunications School of Higher Education of Brittany), officially gives the European rank of "Mastaire" (Masters degree) . . . .

Since this language does not appear on the original French language document, it is simply an assertion of the translator and has no legal weight. However, the substance of the annotation is

[5] Counsel draws this information from two documents in the record: (1) Trends in Learning Structures in Higher Education, Follow-up Report prepared for the Salamanca and Prague Conferences of March / May 2001, and (2) France, Implementation of the 'Sorbonne/Bologna' Process Objectives (1998-2003), Country Report.

supported by an "Attestation" (and certified English translation) from [redacted] of [redacted] dated October 3, 2008, certifying that the beneficiary's title of *Diplome d'Ingenieur* confers the full right of the *Master* degree.

The *Master*, as counsel points out, is the middle degree in France's three-degree structure for universities under the Bologna System – *Licence / Master / Doctorat*, or L-M-D. EDGE describes the *Licence* as three years of post-secondary study at a French university, comparable to three years of university study in the United States. EDGE describes the *Master* as a two-year post-secondary program beyond the *Licence* (resulting in five years of post-secondary study) and comparable to a master's degree in the United States. Since EDGE rates the French *Master* as comparable to a U.S. master's degree, and a *Diplome d'Ingenieur* confers the full right of a *Master* degree in France, counsel asserts that, by EDGE's own logic, the beneficiary's *Diplome d'Ingenieur* is comparable to a U.S. master's degree.

The AAO acknowledges an optical inconsistency in the EDGE analyses of the *Diplome d'Ingenieur* vis-à-vis the French *Master* degree. The AAO notes, however, that the EDGE equivalency analysis for the *Master* focuses on the degree awarded by a university in the L-M-D degree structure – *i.e.* upon completion of a two-year post-secondary program following a three-year *Licence*. The EDGE equivalency analysis does not refer to a *Master* conferred as a matter of right in conjunction with a degree awarded by [redacted] – *i.e.* upon completion of a three-year post-secondary program following a two-year CPGE program. The beneficiary's *Diplome d'Ingenieur* is in this latter category of degree that is not addressed in the EDGE equivalency analysis for the *Master*.

The AAO also notes that the *Diplome d'Ingenieur* is a first professional degree for engineers in France. In the United States the first professional degree for engineers is a baccalaureate, not a master's degree. A U.S. master's degree in engineering requires, in general, at least a year of additional study beyond a bachelor's degree. Seen in this light, the EDGE assessment of the *Diplome d'Ingenieur* as comparable to a U.S. bachelor's degree in engineering is consistent with U.S. norms.[6]

Based on the foregoing analysis, the AAO disagrees with counsel's claim that the EDGE database supports the petitioner's assertion that the beneficiary's *Diplome d'Ingenieur* is equivalent to a U.S. master's degree. The AAO agrees with EDGE's assessment of the *Diplome d'Ingenieur* as comparable to a U.S. bachelor's degree in engineering.

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[6] Another French degree identified in EDGE is the *Mastere Professionnel*, described as a one-year post-graduate program of coursework and internship in a professional field. Entry into the program requires a *Diplome* from [redacted] According to EDGE, a *Mastere Professionnel* is comparable to a master's degree in the United States. It would appear that a *Diplome d'Ingenieur* from [redacted] would qualify an individual for admission to a *Mastere Professionnel* program in France, the successful completion of which would be comparable to a U.S. master's degree in engineering.

Counsel asserts that the beneficiary's five-year *Diplome d'Ingenieur* is equivalent to a master's degree in the United States that results from a five-year engineering program. The petitioner has submitted educational materials from 13 universities and technology institutes in the United States that offer integrated five-year bachelor of science/master of science (BS/MS) programs in electrical and/or computer engineering. The distinguishing feature of all these BS/MS programs is that the students earn a four-year bachelor's degree before they earn a five-year master's degree. No such bachelor's degree, or equivalent foreign degree, is incorporated into the French *Diplome d'Ingenieur*. The CPGE program is the first stage of a *Diplome d'Ingenieur*, but is only two years in length and does not result in a degree of any kind. Thus, the five-year *Diplome d'Ingenieur* in France is a single degree program, whereas five-year engineering programs in the United States integrate two degrees – a bachelor's degree as well as a master's degree. In view of this substantive difference between the two degree programs, the AAO concludes that the beneficiary's *Diplome d'Ingenieur* is not equivalent to a five-year U.S. master's degree in engineering that incorporates a separate bachelor's degree.

The petitioner has submitted evaluations of the beneficiary's educational credentials from [redacted] Washington, dated June 20, 2007 and August 1, 2008, and from [redacted] at the [redacted] of New York [redacted] in Binghamton, prepared in August 2008. Both evaluations assert that that beneficiary's *Diplome d'Ingenieur* is equivalent to a bachelor's degree and a master's degree in the United States.

The FIS evaluation reviews the educational system in France, with particular focus on [redacted] and the *Diplome d'Ingeniuer*. It indicates that transcripts of the beneficiary's coursework at [redacted] were submitted, but contains no substantive analysis of that coursework. Instead, FIS leaps to the conclusion that the *Diplome d'Ingenieur* is equivalent to a combination bachelor's degree and master's degree in electrical engineering, with a specialization in communication systems, from a regionally accredited university in the United States. FIS does not explain how it arrived at its conclusion that the single degree *Diplome d'Ingenieur* in France could be equivalent to a two-degree bachelor and master of engineering in the United States. USCIS uses evaluations of a person's foreign education by credentials evaluation organizations as advisory opinions only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). Due to the shortcomings discussed above, the FIS evaluation has little probative value as evidence of the U.S. equivalency of the beneficiary's *Diplome d'Ingenieur*.

As for [redacted] evaluation, it does discuss the beneficiary's coursework at [redacted] in some detail. Like the FIS evaluation, however, [redacted] equates the single degree *Diplome d'Ingenieur* in France to two degrees in the United States – in this case, a bachelor of science and master of engineering in electrical engineering – without explaining how a first degree professional credential in France could be equivalent to a second degree professional credential in the United States. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any

way questionable, however, USCIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Similar to the FIS evaluation, the AAO concludes that [redacted] evaluation has little probative value as evidence of the U.S. equivalency of the beneficiary's *Diplome d'Ingenieur*.

Counsel cites three decisions issued by the AAO in other immigrant petitions, all unpublished, in which five years of post-secondary foreign education was found to be equivalent to a U.S. master's degree. All three cases concerned educational credentials from Indian universities. One case involved a three-year bachelor of science and a two-year master of science in computer science from the [redacted], in which the AAO found the master of science to be equivalent to a U.S. master's degree in computer science. [redacted] AAO decision Dec. 5, 2007.) The second case involved a three-year bachelor of science and a two-year master of science in physics from [redacted] in which the AAO found the master of science to be equivalent to a U.S. master's degree in physics. [redacted] AAO decision Dec. 5, 2007.) The third case involved a three-year bachelor of commerce and a two-year master of computer management from the [redacted], in which the AAO found the master of computer management to be equivalent to a U.S. master's degree in computer management. [redacted] AAO decision Jan. 9, 2008.)

The three cases discussed above appear to have been incorrectly decided by the AAO. According to EDGE, a two-year Master of Science degree that follows a three-year bachelor's degree in India is comparable to a bachelor's degree in the United States. Likewise, a two-year Master of Computer Management that follows a three-year bachelor's degree in India is comparable to a bachelor's degree in the United States. The AAO is not bound in the instant case by the decisions on those Indian degree cases from 2007 and 2008. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). [7] The AAO concludes that the decisions cited by counsel are not persuasive evidence that the beneficiary's *Diplome d'Ingenieur*,

[7] The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

culminating five years of post-secondary education in France, is equivalent to a master's degree in the United States.

For all of the reasons discussed above, the AAO concludes that the petitioner has failed to establish that the beneficiary is eligible for classification as an advanced degree professional under section 203(b)(2) of the Act based on his *Diplome d'Ingenieur* from [redacted].

Qualifications for the Job Offered

To be eligible for approval under the immigrant visa petition, the beneficiary must have all the education, training, and experience specified on the underlying labor certification as of the petition's priority date, which is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).[8] In this case, the priority date is August 28, 2007.

The petition cannot be approved unless the beneficiary qualifies for the proffered position under the terms of the labor certification.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [immigrant visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

[8] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found in Part H of ETA Form 9089. This section of the labor certification describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education, training, and experience required for the proffered position of software engineer, Part H of the labor certification states the following requirements:

- Lines 4 and 4-B – The minimum education required is a master's degree in networking/computer security, or CS (computer science), network management, or a closely related field.
- Line 6 – Experience in the job offered is not required.
- Line 7 – An alternate field of study is NOT acceptable.
- Line 8 – An alternate combination of education and experience is NOT acceptable.
- Line 9 – A foreign educational equivalent IS acceptable.
- Lines 10 and 10-B – Experience in an alternate occupation IS acceptable. Specifically required – 48 months as a system administration and build/release engineer.

The terms of the labor certification are clear. The employer specified that a master's degree in a computer-related field, or a "foreign educational equivalent," is required for the proffered position. The employer did not state that a bachelor's degree in a computer-related field plus five or more years of progressive experience in the specialty would be considered equivalent to a master's degree, as provided in the regulation at 8 C.F.R. § 204.5(k)(2).

The beneficiary's only post-secondary degree is a *Diplome d'Ingenieur* from a [redacted] awarded after two years of preparatory study in a CPGE program and three years of study at the [redacted] According to EDGE, whose broad expertise on the U.S. equivalency of foreign educational credentials is recognized by USCIS, a *Diplome d'Ingenieur* is comparable to a bachelor's degree in the United States. Based on the EDGE assessment, the AAO concludes that the beneficiary does not have a "foreign educational equivalent" to a U.S. master's degree. Accordingly, he does not satisfy the educational requirement for the proffered position.[9]

Since the beneficiary does not have a foreign equivalent degree to a U.S. master's degree, he does not qualify for the proffered position of software engineer under the terms of the labor certification.

Conclusion

The beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he does not have a U.S. master's degree, or a foreign equivalent degree, in a computer related field. In addition, the beneficiary does does not qualify for the proffered position because he does not meet the terms of the labor certification, which require a U.S. master's degree or an equivalent foreign degree in one of the stated fields. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed

[9] The labor certification also requires four years of experience in "system administration and build/release engineering" which the beneficiary evidently fulfilled based on letters in the record from prior employers.